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Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Ex Parte Notice

Re: Carriage of Digital Television Broadcast Signals, CS Docket No. 98-120
(also CS Docket Nos. 00-96 and 00-2)

Dear Ms. Dortch:

On behalf of our client, Comcast Corporation ("Comcast"), this letter responds to questions that have arisen during Comcast's recent meetings with the Media Bureau and other agency staff. Certain of these matters were also discussed in a meeting that James R. Coltharp of Comcast Corporation and the undersigned had on October 15 with Joel Kaufman and Susan Aaron of the Office of General Counsel.

Q: Would the *Turner*[1] cases be decided the same today as they were in 1994 and 1997?

A: Very possibly not. Remember, those cases were decided 5-4, with spirited and strong dissents, and the majority (and in some cases merely plurality) opinions relied explicitly on an assessment by Congress and the judiciary of marketplace circumstances in the early 1990s. The circumstances of 2003 are dramatically different, and intervening factual developments that weaken the majority's (or plurality's) rationale make it questionable whether five Justices would still vote to support any must-carry requirement.

By far the biggest change in the marketplace since the *Turner* decisions is the vast increase in multichannel video competition. Central to the Court's decision in 1994 and again in 1997 was the 1992 finding by Congress, which the Court accepted, that cable was a monopoly.[2] Today, of course,

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1 *See generally Turner Broadcasting Sys., Inc. v. FCC,* 512 U.S. 622 (1994) ("*Turner I*"); *Turner Broadcasting Sys., Inc. v. FCC,* 520 U.S. 180 (1997) ("*Turner II*").

2 *See, e.g., Turner I,* 512 U.S. at 633, 661; *Turner II,* 520 U.S. at 197.

the record is clear that consumers in every community in the county can access, at a minimum, a second and a third multichannel video programming distributor ("MVPD"), particularly ones with all-digital facilities, a nationwide reach, and (more recently) explicit congressional authorization to carry local broadcast signals. No court today could ignore that competition -- and the more than 20 million households that now subscribe to Direct Broadcast Satellite ("DBS") service.[3]

There is another critical difference between now and when the *Turner* cases were decided and it relates directly to the issue of cable operators' power and incentives in the programming marketplace. Then, vertical integration between cable operators and cable programming networks was substantial (the Court said 64%) and had been rising[4]; today, it is low and has been declining for years.[5]

There are numerous other differences between then and now. One is in the percentage of homes that rely on free over-the-air broadcasting to access television programming. In *Turner II*, the Court found an important federal interest in protecting the 40% of American households that continued to receive their signals off the air.[6] That percentage has now shrunk to less than 15%.[7] Another difference is in audience viewing patterns. Then, the overwhelming majority of households (whether served by an MVPD or not) were at any given hour viewing broadcast television programming. Over the intervening years, despite the ubiquitous carriage of broadcast signals, audience preferences have shifted; cable networks' ratings and audience shares have been on a steady rise -- so much so that, today, a clear majority of the audience typically chooses non-broadcast programming.[8]

Yet another change is that, ten years ago, a single entity could only own a single broadcast license in a given community, while today the Commission has authorized duopolies in many communities and triopolies in others.[9] Must-carry requirements therefore do not function as they did

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[3] Indeed, in *Time Warner Entertainment Co. v. FCC*, 240 F.3d 1126 (D.C. Cir. 2001) (*Time Warner II*), the D.C. Circuit discussed the "substantial changes in the cable industry" that occurred between 1999-2002 (to say nothing of 1992-2003) and admonished the FCC that, in rewriting ownership rules predicated on the "then-existing market power of cable MVPDs," it "will have to take account of the impact of DBS on that market power." *Id.* at 1134.

[4] *Turner II,* 520 U.S. at 198.

[5] *See, e.g., In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Ninth Annual Report, 17 FCC Rcd 26,901 ¶ 134 & n.448 (2002) ("*Ninth Annual Report*") (reporting 30% of programmers as vertically integrated and only 20.6% if Liberty Media is not counted as a cable operator).

[6] *See Turner II,* 520 U.S. at 190.

[7] *See Ninth Annual Report,* app. B, table B-1.

[8] *See* National Cable & Telecomm. Ass'n, *Cable & Telecommunications Industry Overview 2003*, at 15-16 (June 2003) ("*NCTA Overview*") (reporting that, over the past decade, basic cable network viewing shares increased 105% from a 24 share in 1991-1992 to a 53 share in 2001-2002), *available at* http://www.ncta.com/pdf_files/Mid'03Overview.pdf.

[9] *See 2002 Biennial Regulatory Review - Review of the Commission's Broadcast Ownership Rules and Other Rules adopted Pursuant to Section 202 of the Telecommunications Act of 1996, Cross-Ownership of Broadcast Stations and Newspapers, Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets, Definition*

previously to promote "the widespread dissemination of information from a *multiplicity of sources*."[10] In addition, many TV broadcast licensees are now held by companies that own not only broadcast networks but also cable networks; thus, many broadcast "speakers" also occupy various additional channels on cable (and DBS) systems (*e.g.* Fox has widely obtained carriage of fX and Fox News; Disney has obtained widespread carriage of SoapNet, Toon Disney, ESPN Classic; and so on).

In these and other ways, the marketplace today provides much less of a basis even for analog must-carry requirements than it did a decade ago. But that of course is not the question presented in the rulemaking that is currently pending before the Commission.[11] The question today is whether the Commission can properly *expand* broadcasters' must-carry rights in conjunction with their transition to digital broadcasting. The fact that broadcasters' existing must-carry rights are of dubious constitutional legitimacy is relevant only because it helps to underscore that expanded digital must-carry would be difficult to sustain in a constitutional review.

Q: Assuming that the *Turner* cases would be decided the same way today as they were in the mid-1990s, how would the analysis differ as to a digital multicast requirement?

A: There are numerous reasons why the logic of the *Turner* rulings cannot be extended to justify multicast (or dual) must-carry requirements.

At the time of the *Turner* decisions, television broadcasting existed *only* in an analog format. In that context, what the statute required in terms of carriage -- a single stream of analog programming -- was utterly unambiguous. By contrast, a digital multicast requirement is *contrary* to the plain meaning of the statute (which says that only the "primary video" must be carried). The Commission has *already* found the statute to be ambiguous on this point and concluded that the better reading is that, "if a digital broadcaster elects to divide its digital spectrum into several separate, independent, and unrelated programming streams, only one of these streams is considered primary and entitled to mandatory carriage."[12]

In the analog context, there were explicit legislative and judicial determinations based on the state of the marketplace in 1990-1992 that free, over-the-air television broadcasting would be jeopardized in the absence of analog must-carry, thus enabling the *Turner* Court to examine whether the regulation was narrowly tailored to an important governmental interest. There have been no comparable legislative or judicial determinations regarding digital multicast must-carry in the year

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of Radio Markets, Report and Order and Notice of Proposed Rulemaking, 18 FCC Rcd 16554, ¶ 134 (July 2, 2003) (subsequent history omitted).

[10] *Turner II,* 520 U.S. at 189 (emphasis added), *citing Turner I,* 512 U.S. at 662.

[11] It *would* be a legitimate issue in any appeal of the rulemaking order. Thus, to the extent the FCC reads the statute to permit or require dual or multicast must-carry, *all* must-carry requirements would be vulnerable on appeal.

[12] *In the Matter of Carriage of Digital Television Broadcast Signals*, First Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 2598, ¶ 57 (2001)("*Must-Carry Order*").

2003. It is therefore impossible to determine that the broadcast industry, in the absence of a digital multicast must-carry requirement, faces harms that are "real, not merely conjectural," or that the multicast requirement would "in fact alleviate these harms in a direct and material way."[13] There is absolutely no evidence -- much less a detailed Congressional finding based on prolonged hearings -- that a digital multicast must-carry requirement is crucial to alleviate harms to the economic health of the local broadcasting industry. It is impossible to gather such evidence because the digital transition is in some respects still in such an early stage.[14] Indeed, if cable operators were carrying the "primary" digital broadcast feed, any argument that carriage of additional (non-primary) programming is critical to the survival of free, over-the-air television would necessarily be sheer conjecture.[15] Nor can broadcasters claim that digital multicast must-carry is necessary to ensure some future evolution of the broadcast industry; the *Turner* Court read the must-carry statute as having been designed "to preserve the *existing* structure of the Nation's broadcast television medium . . . ."[16]

In the *Turner* cases, the Court perceived that granting each local broadcaster the right to mandatory carriage of its single analog programming channel served the interest of "promoting the widespread dissemination of information from a *multiplicity of sources*"[17] That same logic does not apply to digital multicasting. To the contrary, granting preferential rights to a single broadcast licensee to distribute two, four, six, or even more program streams on a given cable system would amplify the voices of a single speaker, crowding out other, independent voices. Moreover, where duopoly or

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[13] *Turner I*, 512 U.S. at 664 ("When the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than simply 'posit the existence of the disease sought to be cured.'") (internal quotations omitted).

[14] Several broadcasters have failed to begin digital broadcasting in a timely manner, others only broadcast in digital in low-power, and of those broadcasting in digital, hardly any (other than noncommercial educational stations) have concocted a coherent digital multicast plan. At this point, it is not clear what broadcasters want and whether what they want can be achieved through voluntary commercial negotiations. *See e.g.,* Letter from James L. Casserly, Counsel to Comcast Corp., to Marlene Dortch, Secretary, FCC, MB Dkt. 98-120, at 1 (Sept. 6, 2002) (recounting the statements by Comcast's Vice President of Programming that "while some commercial broadcasters are reportedly contemplating multicasting, none that Comcast has encountered are currently doing so, and none has articulated to Comcast any particular plans for the programming that they would wish to have carried"), *available at* http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6513290769. In the year since that letter was filed, relatively few commercial broadcasters have begun digital multicasting, and some of these arrangements are experimental and transitory. Until broadcasters implement (or at least formulate) concrete plans for their multicast programming and seriously discuss those plans with the MVPDs they wish to carry their signals, there is no basis upon which the MVPDs can reasonably evaluate such requests -- and even less basis for the government to determine that non-carriage of such multicast programming jeopardizes any important governmental interests.

[15] *Turner I*, 512 U.S. at 664-65 (explaining "we must ask first whether the Government has adequately shown that the economic health of local broadcasting is in genuine jeopardy and in need of the protections afforded by must-carry").

[16] *Turner II,* 520 U.S. at 193, *citing Turner I,* 512 U.S. at 652. Notably, broadcasters see changed circumstances, not continuity, when it comes to burdens that affect *them*. *See, e.g.,* Comments of the National Association of Broadcasters, MM Docket No. 99-360, at 4 (Apr. 21, 2003) ("NAB strongly believes that rules pertaining to the public interest obligations of DTV broadcasters should not be adopted until digital services have been allowed to develop more fully.").

[17] *Turner II*, 520 U.S. at 189 (emphasis added), *citing Turner I,* 512 U.S. at 662.

triopoly arrangements have been authorized, a single broadcaster might control 18 or more program streams. This, of course, does nothing to promote dissemination of information from a "multiplicity of sources." The more likely effect is precisely the opposite.

In addition to evidence regarding the threat to broadcasters in the absence of a must-carry requirement, the *Turner* Court also required evidence about the effects of must-carry on the speech of cable operators and programmers.[18] Again, the evidence needed to sustain an expanded requirement is lacking.[19] In the analog context, the Court felt that the burden on cable operators and on independent programmers was small, in part because "the vast majority of [broadcast] channels would continue to be carried in the absence of any legal obligation to do so."[20] Similarly, the analog case included record evidence that the must-carry requirements could be satisfied "87 percent of the time using previously unused channel capacity."[21] No comparable findings could be made as to digital multicasting. The percentage of broadcast multicast channels that would be carried in the absence of governmental coercion is unknown and unknowable in an environment in which (i) many broadcasters have not yet formulated concrete programming plans and discussed them with the MVPDs on whose systems they desire carriage and (ii) cable operators are rapidly adding numerous new programming services to their channel line-ups (largely driven by the need to compete with all-digital, nationwide DBS competitors) and simultaneously using additional bandwidth of the cable plant to deploy additional services like video-on-demand, HDTV, high-speed cable Internet, and IP phone services. While the precise bandwidth requirements of all these services cannot be quantified (and indeed are constantly changing), there is no doubt that the reason the cable industry expended over $75 billion in network upgrades and rebuilds was to create bandwidth for the services the cable operators determined were desired by their customers, not to create space for compulsory, uncompensated occupancy by third parties who believe that their privileged access to *public* resources necessarily entitles them to privileged access to *private* resources.

Q: What is the significance of the *Tahoe-Sierra*[22] case to a Fifth Amendment analysis of must-carry requirements?

A: The Supreme Court's ruling in *Tahoe-Sierra* is in no way inconsistent with Comcast's view that expanded must-carry requirements present Fifth Amendment issues. As this case confirms, constitutional "takings" may occur both when the government takes action that involves a physical

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18 *See Turner I*, 512 U.S. at 667-68.

19 *See id.* at 668 (stating "unless we know the extent to which the must-carry provisions in fact interfere with protected speech, we cannot say whether they suppress 'substantially more speech than . . . necessary' to ensure the viability of broadcast television") (internal citations omitted).

20 *Turner II,* 520 U.S. at 214.

21 *Id.*

22 *See generally Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002).

intrusion onto private property and when it uses regulation to restrict a private property owner's use of his or her own property.

The Bureau's question about this may have been predicated on a view that must-carry requirements constitute a regulatory restriction but not a physical intrusion. Comcast's view is otherwise. Must-carry is *not* a situation involving "regulations prohibiting private uses" of property[23] but rather an "acquisition [] of property for public use"[24] by broadcasters whose signals will physically intrude onto cable operators' cable systems. This is not a case where a governmental restriction would simply preclude a property owner from making productive use of his property but rather one in which the property will be encumbered by the physical presence of electronic signals occupying finite bandwidth throughout the fiber optic and cable lines owned by the cable operator, crowding out other programming that cable operators might prefer to carry. As *Loretto* teaches, even a "minor but permanent physical occupation" will suffice as a taking -- in that case, not much more than 1.5 cubic feet of a building's roof.[25]

Tahoe-Sierra also confirms the rule -- first articulated in the *Penn Central* case -- that, even in the absence of a physical intrusion, regulatory restrictions on the use of property also can constitute "takings" for Fifth Amendment purposes.[26] As a long line of cases confirms, regulatory takings require essentially ad hoc, factual inquiries focusing on the nature of the governmental action, the severity of its economic impact, and the degree of interference with the property owner's reasonable investment-backed expectations.[27]

Although the *Tahoe-Sierra* decision rejects "the extreme categorical rule that any deprivation of all economic use, no matter how brief, constitutes a compensable taking," it endorsed Justice Holmes's admonition that "if regulation goes too far it will be recognized as a taking."[28] And, in this regard, the Court strongly suggested that any regulatory restriction "that lasts more than a year should be viewed with special skepticism."[29] In that case, the Court felt bound to treat a 32-month restriction as "not unreasonable," but only because of District Court findings tied to the unique circumstances of the *Tahoe-Sierra* situation.[30] By contrast, a digital multicast must-carry requirement would presumably not be time-limited but permanent.

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23 *See id.* at 323.

24 *See id.*

25 *Loretto v. Teleprompter Manhattan CATV Corp*., 458 U.S. 419, 438 n.16 (1982).

26 *See Tahoe-Sierra*, 535 U.S. at 326; *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978).

27 *See, e.g., Penn Central,* 438 U.S. at 124.

28 *Tahoe-Sierra*, 535 U.S. at 326, *citing Pennsylvania Coal v. Mahon*, 260 U.S. 393, 415 (1922).

29 *Tahoe-Sierra*, 535 U.S. at 342.

30 *Id.* at 341-42.

Q: Are the constitutional concerns raised by mandatory carriage of multiple multicast signals avoided so long as the multicast signals collectively occupy no more bandwidth than would a single HDTV signal?

A: No. The constitutional burdens associated with any given form of must-carry requirement must be evaluated specifically with regard to that requirement. The logic that might possibly sustain a requirement that cable operators carry a single channel of HDTV programming per local broadcast licensee (after the digital transition has been completed and analog spectrum has been returned to the government) would not apply to a requirement that cable operators carry multiple channels of standard-definition programming. Even if the bandwidth requirements were identical, a variety of other factors (many of them discussed above) would differ.

Certainly multicast must-carry would be easier than HDTV must-carry to characterize as being a logical extension of the single-programming-channel carriage requirement that the Court sanctioned in the *Turner* decisions. Certainly multicast must-carry would require carriage of a significantly greater number of program streams that cable operators would not otherwise have chosen, thereby leading to more compelled speech on the part of the cable operators. It is also likely that the aggregate composition of all of those programming streams -- possibly as many as 120 or so in the aggregate (all of which are required to be carried on the basic tier)[31] -- will in turn affect the editorial choices that a cable operator will as a practical matter be able to make (and the business plan that it will be able to execute) with respect to the programming that it retains discretion to choose. And certainly the Supreme Court has not yet found (not is it likely to do so) that one kind of MVPD (a cable operator) must be made to sacrifice First and Fifth Amendment rights so as to promote the evolution of broadcasters into multichannel video programming competitors.

To be sure, the adverse effects of a multiple must-carry requirement on cable operators' First and Fifth Amendment rights cannot be precisely quantified at this time, given that so little is known about the programming that broadcasters would offer and that so many other aspects of the broadband marketplace, including the services offered and the sources of competition for each, are so rapidly evolving. Certainly multicast must-carry would have the *potential* to interfere with cable operators' free speech, free press, and property rights in ways that go beyond the burdens imposed by post-transition carriage of a single high-definition primary video signal -- even if the same bandwidth is required for both. And multicast must-carry necessarily is further attenuated than is carriage of a single HDTV signal from the public interest objectives pursued by Congress and approved by the Court in the *Turner* cases. For all these reasons (and others discussed above), a requirement for multicast must-carry would almost surely fail judicial review and could not be saved by a claim that it requires no additional bandwidth.[32]

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[31] *See* 47 U.S.C. §§ 534(b)(7) & 543(b)(7) (requiring all signals carried in fulfillment of sections 614 and 615 to be on the basic tier; subscriptions to the basic tier shall be required before a consumer may access any other tier of service).

[32] In this regard it is notable that, after the D.C. Circuit required the FCC to scale back the types of equipment that competitive local exchange carriers ("CLECs") are permitted to collocate in the central offices of incumbent local exchange

This letter is filed pursuant to Section 1.1206(b)(2) of the Commission's rules. Please let me know if you have any questions.

Respectfully submitted,

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carriers ("ILECs"), the FCC on remand did *not* authorize CLECs to collocate not only equipment of the sort that is authorized by the statute but also any other equipment that does not meet the statutory standard so long as it does not take up any more room. *See GTE Service Corp. v. FCC*, 205 F.3d 416 (2000), *on remand, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 16 FCC Rcd. 15,435 (2001). It was presumably understood that the D.C. Circuit would not find such a requirement amusing -- or lawful. And that situation did not present either the First or Fifth Amendment considerations present in the multicasting situation -- freedoms of speech and of the press were not implicated by the collocation requirement, and the CLECs were required to compensate the ILECs for use of their space.